

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIUS WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

August 25, 2005

No. 245618

Wayne Circuit Court

LC No. 99-002114-01

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction and fourteen years, three months to thirty years' imprisonment for the assault conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise out of the shooting of the victim that left the victim paralyzed from the waist down. The victim testified that he owned rental property on Parkside Street in Detroit. He had rented the property to Georgia Whitehead, who resided there with her husband. Because of illegal narcotic activity, police raided the home while Whitehead was the tenant of the property. The victim was in the process of cleaning the property to rent it when he was approached by defendant who called himself "Burt." Defendant made representations that he had purchased the property from Whitehead and paid outstanding taxes on the property. The victim told defendant that he was the owner. Defendant offered to rent or purchase the property. One to two weeks later, the victim was walking down the street late at night when he saw a turquoise vehicle. The victim was shot by a man who fired from the back seat window. The victim told police that "Burt" shot him and described the vehicle. The chief investigator contacted police officers assigned to the area with this information that led to the conclusion that defendant was the perpetrator of the offense. Defendant's picture was placed in a photographic lineup, but the victim was unable to identify him at that time.<sup>1</sup> The victim asked for a live

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<sup>1</sup> The photograph viewed by the victim was five years old.

lineup, but defendant was not in custody at that time. Later, the victim identified defendant as the perpetrator of the offense.<sup>2</sup>

Defendant first alleges that he was denied the effective assistance of counsel. We disagree. Because there was no *Ginther*<sup>3</sup> hearing, our review is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and the deficient performance deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A trial court's factual findings are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *Id.* at 578.

Defendant first alleges that trial counsel was ineffective for arguing facts not in evidence by making representations regarding the vehicle utilized in the shooting. Defendant has failed to meet his burden of demonstrating ineffective assistance and that any misstatement regarding the vehicle involved was prejudicial error. It was clear that, although the victim was able to identify his shooter as "Burt," he was unable to definitively identify the vehicle involved in the shooting. At various times, the vehicle utilized was referred to as "a Suburban," "a type of Taurus," and "a 300." However, the prosecutor presented photographs of various vehicles to the victim, and the victim acknowledged that the vehicles looked similar in appearance to him. Moreover, the conviction was not premised on the make and color of the vehicle, but on the victim's prior contacts and identification of defendant. Accordingly, this claim of error is without merit.

Defendant also alleges ineffective assistance of counsel for failing to elicit evidence regarding police coercion of a witness. We disagree. Decisions regarding the type of evidence to present and whether to interview or call witnesses are presumed to be matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses or present other evidence only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Grant*, 470 Mich 477, 497; 684 NW2d 686 (2004). In the present case, defendant was not deprived of a substantial defense. The trial court was apprised that any statements made by this witness were allegedly elicited by police coercion because police deliberately held the witness' van in custody in order to compel a statement.

Defendant next alleges that defense counsel was ineffective for failing to move to disqualify the trial court because it had previously presided over the *Wade*<sup>4</sup> hearing and also accepted a guilty plea from this defendant in an unrelated case. We note that actions of counsel are presumed to be trial strategy. *LeBlanc, supra*. Moreover, counsel may not harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). In the

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<sup>2</sup> The trial court granted the motion to suppress, but was reversed on appeal. Docket No. 226603.

<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>4</sup> *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

present case, defense counsel was aware of the prior hearing and other charges, but did not move to disqualify the trial court. In light of the trial court's prior dismissal of the charges based on identification, defense counsel's actions could be construed as trial strategy. In any event, trial counsel failed to demonstrate prejudice and evidence of actual bias. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996); *People v White*, 411 Mich 366, 386; 308 NW2d 128 (1981).

Lastly, defendant alleges trial counsel was ineffective for failing to investigate the existence of another man named "Burt." Defendant was not deprived of a substantial defense. *Grant, supra*. It was the defense theory that another man was the shooter, and evidence was presented to that effect by contesting the identification by the victim. Accordingly, this challenge is without merit.

Defendant next alleges that it was error to deny the motion for new trial based on newly discovered evidence. We disagree. Evidence that is available prior to trial is not newly discovered. See *People v Lewis*, 31 Mich App 433, 437; 188 NW2d 107 (1971). The victim testified that Whitehead was his tenant at the drug raided property at the *Wade* hearing and at trial. Consequently, this evidence is not newly discovered. Moreover, the trial court's factual findings are reviewed for clear error. *LeBlanc, supra*. In the present case, although not explicitly stated, the trial court implicitly concluded that Whitehead, the witness utilized to support the motion for new trial, was not credible. Indeed, Whitehead alleged that the shooter was someone other than defendant, yet she testified that the shooting occurred during the day when, in fact, it occurred between 11:00 p.m. and midnight. Moreover, she had a motive to offer testimony against the victim in light of his implication of her family in criminal activity. Under the circumstances, we cannot conclude that the trial court's decision was erroneous. To the extent the trial court failed to admit additional evidence offered by the defense, the trial court did not abuse its discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The victim's prior conviction was not relevant or material.

Lastly, defendant alleges that reversal is required because the trial court erroneously shifted the burden of proof during closing argument and because of prosecutorial misconduct. We disagree. In a bench trial, it is presumed that the trial court follows the law and understands the distinction between admissible and inadmissible evidence. *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971). The record does not support the claimed errors in this bench proceeding. The trial court did not improperly shift the burden of proof, but asked questions to aid in assessment of the credibility of the witnesses. Moreover, the statements by the prosecutor do not rise to the level of misconduct, particularly in this bench trial.

Affirmed.

/s/ Hilda R. Gage  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood